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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974.

No. 74-1043

NISSAN MOTOR CORPORATION IN U. S. A.,
Petitioner,

vs.

JAMES W. SANDERSON,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent prays that the Petition for Writ of Certiorari be denied.

QUESTION PRESENTED

Whether a party plaintiff seeking to represent a 23(b)(3) class in an antitrust class action, who has demonstrated his willingness and ability to pay the cost of notice to members of the class, is required under *Eisen*[1] to submit to unlimited, irrelevant and oppressive discovery with respect to his income tax returns, personal financial statements, attorneys' fee arrangements and all other documents reflecting specific financial capacity in connection with defendant's *in limine* inquiry as to whether the suit may be maintained as a class action.

1. This Court's decision in *Eisen* v. *Carlisle & Jacquelin*, 417 U. S. 156 (1974) is herein referred to as *Eisen;* the Second Circuit's 1968 *Eisen* decision at 391 F. 2d 555 is herein referred to as *Eisen II;* and the Second Circuit's 1973 *Eisen* decision at 479 F. 2d 1005 is herein referred to as *Eisen III.*

STATEMENT OF THE CASE

Respondent, James W. Sanderson, commenced this antitrust class action in the United States District Court for the District of Colorado against petitioner, its parent corporation, and various Nissan dealers located in the State of Colorado. The complaint tracked the price fixing allegations contained in a prior civil injunctive proceeding instituted by the United States of America.[2] The class defined in the complaint consisted of "all persons, natural or legal, who during the period in controversy purchased at retail a new Datsun motor vehicle from a Nissan dealer located in the State of Colorado."

Prior to the filing of any motion for class determination, the District Court, on June 25, 1974,[3] overruled respondent's objections and ordered production of the following documents:[4]

> "2. Current financial statements, income tax returns for the years 1972 and 1973, and any other writings or documents reflecting plaintiffs' ability to finance the expenses that may be involved in this purported class action litigation.
>
> 3. Any agreements plaintiffs have made, collectively or individually, among themselves, with their attorneys of

2. As alleged in ¶ 22 of the complaint, on June 30, 1972, the United States of America instituted a civil injunctive proceeding, Civil Action No. C-72-1212, in the United States District Court for the Northern District of California against petitioner. The federal government charged that beginning sometime prior to 1966 and continuing thereafter up to and including the date of filing of that complaint, petitioner and the Nissan dealer co-conspirators engaged in an unlawful combination and conspiracy in restraint of interstate and foreign commerce in Datsun motor vehicles in violation of § 1 of the Sherman Act. The government action was terminated by a consent decree entered February 26, 1973.

3. The transcript of this June 25, 1974 hearing on discovery motions before the District Court is reproduced at Appendix B of Petitioner's Appendices.

4. The District Court's ruling is reproduced at Pet. App. B-4 through B-6.

> *record herein . . . pertaining to* (a) the financing of the costs of this litigation, and (b) the payment of attorneys' fees that might be incurred. Such documents should include, in addition to express written agreements, correspondence and any and all other writings or records reflecting any oral agreements that may have been made or understandings that may have been reached."[5]

Subsequently, at his deposition on June 26, 1974, respondent, who is the Regional Counsel for the United States Environmental Protection Agency in Denver, unequivocally affirmed his obligation to assume the financial burden of notice to the class, as follows:

> "I have to bear the costs. That is, I—the plaintiffs have to bear the costs of notice to the class . . ." (Sanderson dep. 75)

Respondent further testified that he was willing to assume the "potential liability" for taxable costs in the event, as the plaintiff individually and on behalf of the class, he loses the case. (Sanderson dep. 83)

The District Court refused to grant certification, pursuant to Title 28, U. S. C. § 1292(b), of its June 25, 1974 ruling. (Pet. App. C-2). Respondent, on August 14, 1974, filed a petition in the United States Court of Appeals for the Tenth Circuit, pursuant to Title 28, U. S. C. § 1651, seeking vacation of the June 25, 1974 order.[6] The Court of Appeals for the Tenth

5. With respect to this paragraph 3 of petitioner's Notice to Take Depositions served on June 1, 1974, respondent's objections thereto, and the Tenth Circuit's decision in *Sanderson* v. *Winner*, 507 F. 2d 477 (10th Cir. 1974), relates solely to agreements described therein between plaintiffs and their attorneys in this action. In a response, filed February 3, 1975, to petitioner's First Combined Interrogatories and Request for Production of Documents, respondent stated that there are no such agreements with any other persons.

The opinion and judgment of the Court of Appeals for the Tenth Circuit in *Sanderson* v. *Winner supra*, is reproduced at Appendix A of Petitioner's Appendices.

6. In connection with this petition, respondent reaffirmed his willingness to bear the $4,000.00 estimated cost of notice to the class. See Affidavit of James W. Sanderson annexed hereto as Respondent's

(Footnote continued on next page)

Circuit issued a unanimous opinion vacating the June 25, 1974 order.[7]

Subsequently, on December 10, 1974, the Judicial Panel on Multidistrict Litigation, pursuant to Title 28, U. S. C. § 1407, transferred this action and eight related actions to the Southern District of Florida and assigned such cases to the Honorable C. Clyde Atkins for coordinated or consolidated pretrial proceedings with the actions in the Nissan Motor Corporation Antitrust Litigation, M. D. L. Docket No. 120, already pending in that district.[8]

Appendix A, which was attached as an appendix to respondent's petition to the Court of Appeals for the Tenth Circuit. As set forth at p. 7 n. 10, *infra*, respondent's $4,000.00 commitment is more than adequate to cover notice costs.

7. *Sanderson* v. *Winner*, *supra*.

8. *In re Nissan Motor Corp. Antitrust Litigation*, 1974-2 Trade Cases ¶ 75,409 (J. P. M. L. 1974).

REASONS FOR DENYING THE WRIT

I.

THE DECISION OF THE TENTH CIRCUIT IS NOT IN CONFLICT BUT IS IN ACCORD WITH THIS COURT'S DECISION IN EISEN.

II.

THE DECISION OF THE TENTH CIRCUIT IS NOT IN CONFLICT WITH THE DECISION OF ANY OTHER COURT OF APPEALS ON THE SAME MATTER.

III.

THE DECISION OF THE TENTH CIRCUIT DOES NOT CREATE A CONFLICT WITHIN THE SAME CASE.

IV.

THE DECISION OF THE TENTH CIRCUIT DOES NOT DEPRIVE THE PETITIONER OF DUE PROCESS.

I.

THE DECISION OF THE TENTH CIRCUIT IS NOT IN CONFLICT BUT IS IN ACCORD WITH THIS COURT'S DECISION IN EISEN.

A. The Tenth Circuit's Decision Is In Accord With This Court's Holding in Eisen.

In *Eisen*, this Court held that:

". . . Rule 23(c)(2) requires that individual notice be sent to all class members who can be identified with reasonable effort.

> "We also agree with the Court of Appeals that petitioner must bear the cost of notice to the members of his class . . .
>
> • • • • •
>
> "In the absence of any support under Rule 23, petitioner's effort to impose the cost of notice on respondents must fail. The usual rule is that a plaintiff must initially bear the cost of notice to the class . . ." (417 U. S. at 177-78)

Consequently, the Federal courts have consistently read this Court's opinion in *Eisen* as holding that Rule 23(c)(2), and the due process notice standards which it incorporated, require that the plaintiff class representative in a 23(b)(3) class action initially bear the cost of notice to the class and that individual notice must be sent to all class members who can be identified with reasonable effort.[9]

The Tenth Circuit's decision in this action is wholly in accord with this Court's holding in *Eisen:*

> ". . . We recognize that the class action is unique and we see the necessity for the court to be satisfied that the plaintiff or plaintiffs can pay the notice costs, and we also agree fully with the Court's ruling in *Eisen* that due process requires decent notice. But we do not read *Eisen* as creating

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9. *Alabama Optometric Association, et al.* v. *Alabama State Board of Health, et al.*, 379 F. Supp. 1332, 1341 (M. D. Ala. 1974); *Bormann* v. *Long Island Press Publishing, Inc., et al.*, 379 F. Supp. 951, 954 (E. D. N. Y. 1974); *Feldman, et al.* v. *Lifton, et al.*, 64 F. R. D. 539, 550 (S. D. N. Y. 1974); *Madonick* v. *Denison Mines, Limited*, 63 F. R. D. 657, 659-60 (S. D. N. Y. 1974); *George* v. *United Federal Savings and Loan Association*, 63 F. R. D. 631, 637 (N. D. Ga. 1974); *Foster, et al.* v. *Maryland State Savings & Loan Association*, 1974-2 Trade Cases ¶ 75,277 (D. D. C. 1974); *Goethe* v. *Texaco, Inc., et al.*, 1974-2 Trade Cases ¶ 75,146 (S. D. Ga. 1974) (District Court temporarily stayed antitrust class action pending *plaintiffs'* determination as to their willingness and ability to bear the expense of notice to the class).

See also, *Wetzel* v. *Liberty Mutual Insurance Company*, 508 F. 2d 239, 254-55 (3rd Cir. 1975); *In re Four Seasons Securities Laws Litigation*, 502 F. 2d 834, 843 n. 11 (10th Cir. 1974); *Haas* v. *Pittsburgh National Bank, et al.*, 381 F. Supp. 801, 802 (W. D. Pa. 1974); *Souza* v. *Scalone, et al.*, 64 F. R. D. 654, 658-59 (N. D. Cal. 1974).

a presumption against finding a class action. Nor does it approve oppressive discovery as a means of discouraging a private antitrust action which, if meritorious, advances an important interest of the government." (507 F. 2d at 479-80)

The Court of Appeals found that the District Court's decision went far beyond the holding of *Eisen*:

> ". . . We view the trial court's decision as an unwarranted extension of the Supreme Court's decision in Eisen v. Carlisle & Jacquelin, 417 U. S. 156, 94 S. Ct. 2140, 40 L. Ed. 2d 732 (1974), which extension would limit and curtail Rule 23 in a manner never contemplated.
>
> • • • • •
>
> ". . . We read the District Court's decision as expanding and projecting the *Eisen* case . . . . [T]here is nothing in the opinion of Mr. Justice Powell in *Eisen* which calls for unlimited inquiry into the financial capacity of plaintiff or which authorizes exposure of the plaintiff's income tax returns together with financial statements, plus documents showing specific financial capacity. Nor are fee arrangements with lawyers a prescribed discovery subject." (507 F. 2d at 479)

B. Respondent's Willingness and Ability to Bear the Cost of Notice to the Class Are a Matter of Record in This Action.

Unlike in *Eisen*, there is no issue in this action as to respondent's willingness to bear the cost of the class notice. Respondent is willing to bear $4,000.00 for class notice costs. (Resp. App. A) This $4,000.00 commitment is more than adequate to pay the full cost of notice to the class members.[10]

10. Contrary to its assertion that "the number of Datsun motor vehicles sold at retail by Colorado Datsun dealers during the approximate period in controversy exceeded 25,000 vehicles" (Pet. p. 5 n. 6), petitioner's answer, served on October 1, 1974, to respondent's Jurisdictional Interrogatory No. 15(c)(i) states that during the period 1966-1972 the total number of new Datsun motor vehicles sold at retail in the State of Colorado was 17,330, and in 1973, 6,271 new Datsun motor vehicles were sold at retail in that State. See

(Footnote continued on next page)

Respondent's consistent expressions of willingness to bear the cost of individual class notice in this action are in stark contrast to the expression of the petitioning class representative in *Eisen* where this Court noted:

> "Petitioner has consistently maintained, however, that he will not bear the cost of notice under subdivision (c)(2) to members of the class as defined in his original complaint." (417 U. S. at 179)

Moreover, respondent's ability to bear the cost of notice to the class in this action is a matter of record. As stated by the Tenth Circuit, "... defendants know the plaintiff's resources. His salary is a matter of record in the case." (507 F. 2d at 480)[11]

Under the circumstances, there can be no legitimate concern with respondent's ability to successfully lead the class which he seeks to represent. *Sanderson* v. *Winner, supra,* at 480. Thus, petitioner's professed concern that respondent has commenced this antitrust class action "on a shoe-string", and its further speculation that respondent may not be financially able to pay

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petitioner's answer to Jurisdictional Interrogatory No. 15(c)(i) annexed hereto as Respondent's Appendix B.

If first class postage is used, the cost for printing and paper and for postage, stuffing and mailing will be approximately 14 to 15 cents apiece; or if third class bulk postage is used, such cost will be approximately 10.4 cents apiece (6.1 cents for 3rd class bulk postage, 2.5 cents for printing and paper, and 1.8 cents for stuffing, sorting by zip code, and mailing). *Eisen* at 167 (postage, stuffing and mailing each individual notice form would cost 14 cents, after adjusting for the increase of first class postage rates from 6 cents to 10 cents); *Herbst* v. *International Telephone & Telegraph Corp.*, 18 FR Serv 2d 779, 784 (D. Conn. 1973), aff'd, 495 F. 2d 1308 (2nd Cir. 1974) (cost of notice to 16,000 class members estimated to be $2,240.00). Accordingly, with a class consisting of approximately 17,330 members, the cost for printing and paper and for postage, stuffing and mailing the notice to the class members will range between $1,802.32 for third class bulk postage and $2,426.20 to $2,599.50 for first class postage.

11. Respondent's annual salary ($22,744 as a GS-13 government employee) is both a matter of public information and a matter of record in this action.

the cost of class notice, is a straw man.[12] It is apparent that petitioner's assertions are not based upon any legitimate concern that due process be afforded purported class members but rather are nothing more than a blatant attempt to "chill" the class by oppressive and harassing discovery techniques, thereby undermining the strong public policy favoring private enforcement of the antitrust laws.[13]

II.

THE DECISION OF THE TENTH CIRCUIT IS NOT IN CONFLICT WITH THE DECISION OF ANY OTHER COURT OF APPEALS ON THE SAME MATTER.

Significantly, petitioner has cited no decision of any other court of appeals in conflict with the Tenth Circuit's resolution of the key issue in this action: whether a party plaintiff

12. It is equally clear that the District Court's "pot of gold" speculation (Pet. App. B-5), and petitioner's professed concern that "the potential expenses [may] far outstrip any possible recovery" (Pet. pp. 7-8), are irrelevant here. With an estimated damage potential of "approximately $600 ($200 trebled) per class member" [*P. D. Q., Inc. of Miami* v. *Nissan Motor Corporation in U. S. A.*, 61 F. R. D. 372, 376 (S. D. Fla. 1973)], and class notice costs of between 11 cents and 15 cents per class member (see p. 8 n. 10, *supra*), it can hardly be said that the cost of administration, including notice costs, may exceed the amount of damages sustained.

In view of the prior federal government proceeding and consent decree (see p. 2 n. 2, *supra*), petitioner's *in terrorem* argument (Pet. p. 8) is also clearly irrelevant to this case.

13. *Hawaii* v. *Standard Oil Co.*, 405 U. S. 251, 262 (1972) ("By offering potential litigants the prospect of a recovery in three times the amount of their damages, Congress encouraged these persons to serve as 'private attorneys general' "); *Perma Life Mufflers, Inc., et al.* v. *International Parts Corp., et al.*, 392 U. S. 134, 139 (1968) (". . . the purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws."); *Minnesota Mining & Manufacturing Co.* v. *New Jersey Wood Finishing Co.*, 381 U. S. 311, 318 (1965) ("Congress has expressed its belief that private antitrust litigation is one of the surest weapons for effective enforcement of the antitrust laws"); *Emich Motors Corp.* v. *General Motors Corp.*, 340 U. S. 558, 567-68 (1951); *Bruce's Juices, Inc.* v. *American Can Co.*, 330 U. S. 743, 751-52 (1947).

seeking to represent a 23(b)(3) class, who has demonstrated his willingness and ability to pay the cost of notice to the class, may be compelled under *Eisen* to submit to unlimited, irrelevant and oppressive discovery of the type involved in this action. There is no decision of another court of appeals on the same matter in conflict with the decision of the Tenth Circuit.

The Ninth Circuit's decisions in *Hotel Telephone Charges*[14] and *Kline*[15] are totally irrelevant to this action. Neither of these decisions dealt directly or inferentially with the subject matter of the Tenth Circuit's decision.[16] Furthermore, unlike in *Hotel Telephone Charges* and *Kline*,[17] there is no issue as to legal

14. In *In re Hotel Telephone Charges*, 500 F. 2d 86 (9th Cir. 1974), cited at Pet. p. 18, the complaints alleged a nationwide conspiracy among 47 hotel chains and approximately 600 individual hotels to increase room rates in violation of federal antitrust laws and state laws. The plaintiffs sought to represent a class consisting of an estimated 40 million hotel guests. The parties agreed that the claim of the average class member would be about $2.00 per person in the event of recovery.

15. In *Kline* v. *Coldwell, Banker & Co.*, 508 F. 2d 226 (9th Cir. 1974), cited at Pet. p. 18, plaintiff, seeking to represent a class of approximately 400,000 persons, brought suit against the Los Angeles Real Estate Board and 32 real estate broker defendants representing a defendant class of approximately 2,000 brokers, alleging a conspiracy to fix brokerage commissions in violation of § 1 of the Sherman Act.

16. In both *Hotel Telephone Charges* and *Kline*, the Ninth Circuit reversed the District Court's class certification on the ground that common questions did not predominate over individual questions and that a class action was not a superior method of adjudication.

17. The fact situation in *Hotel Telephone Charges* was totally different than in this action. In *Hotel Telephone Charges*, the claim per class member was estimated at $2.00 and "even trebled, the amount of recovery would be entirely consumed by the cost of notice alone." The Ninth Circuit observed that "in view of the non-existent, or miniscule, recoveries that are likely to accrue to the supposedly intended beneficiaries, it is not surprising that most of the named plaintiffs are attorneys acting as counsel for themselves," and thus noted that the action was "primarily generated and financially supported by the lawyers." In its opinion, the Ninth Circuit cited "the initiation and financial maintenance of the suits primarily by attorneys acting in a dual capacity as named plaintiffs and counsel for

ethics in this case. This is apparent from the record in this action[18] and the Tenth Circuit's decision. As the Tenth Circuit noted in its opinion:

> "Legal ethics would ordinarily be inquired into in separate proceedings but, in any event, they do not call for an independent inquiry where, as here, no evidence suggesting unethical conduct has surfaced." (507 F. 2d at 478 n. 2)

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the plaintiffs" as one of the factors for reversing the District Court's class certification. (500 F. 2d at 91, 92)

In *Kline*, Judge Duniway's abstract reference to solicitation in his concurring opinion clearly constitutes a general critique of Rule 23. Thus Judge Duniway's rhetorical question, "Does solicitation cease to be solicitation when done under the aegis of a judge?" (508 F. 2d at 238)

18. At his deposition on June 26, 1974, respondent testified that he was not solicited to bring this action nor did his counsel suggest that he be a named plaintiff in this suit (Sanderson dep. 195, 203). Respondent further testified, and his counsel stated, that neither of them had had any communications with any members of the class which the respondent seeks to represent (Sanderson dep. 23-24). In light of the foregoing, petitioner's contention (Pet. p. 16) that the Tenth Circuit's decision "prevents any such evidence [of unethical conduct] from surfacing" is clearly without foundation. The fact of the matter is that the questions were asked and answered at the respondent's deposition, thus ending any need for further inquiry.

Furthermore, petitioner's assertions of "possible indications of unethical conduct in this case," cited at Pet. p. 15 n. 18, represent gross distortions of the record in this action. The record is clear that respondent counsel's $2,000 to $4,000 estimate related solely to class notice costs, not all "expenses of this sizeable and complex antitrust litigation." (Sanderson dep. 75, 78-79) Furthermore, being fully aware that the "cost of notice and other taxable costs [in this action] are considerably less than $10,000", respondent also testified that he was willing to assume the "potential liability" for taxable costs in the event, as the plaintiff individually and on behalf of the class, he loses the case. (Plaintiff's Motion To Stay All Proceedings Pending Appellate Review, p. 2; Sanderson dep. 79-80, 83) In any event, as discussed previously, respondent's $4,000 commitment is more than adequate to pay the full cost of notice to the class members. See p. 7 n. 10, *supra*.

In light of the foregoing, the *Hotel Telephone Charges*, *Kline* and *Snowden* decisions, cited at Pet. pp. 16 and 18, are clearly irrelevant to this action.

Likewise, the Tenth Circuit's decision is not in conflict with the pre-*Eisen* district court decisions in *King*,[19] *Buford*[20] and *Givens*.[21] None of these decisions dealt with the subject matter of the Tenth Circuit's decision. Furthermore, in recognizing "the necessity for the court to be satisfied that the plaintiff or plaintiffs can pay the notice costs" and "agree[ing] fully with the Court's

19. In *King* v. *Sharp*, 63 F. R. D. 60 (N. D. Tex. 1974), cited at Pet. p. 16, the District Court denied plaintiffs' motion for class certification on the grounds that: (a) the plaintiff trustee under Chapter X of the Bankruptcy Act had failed to establish his standing to represent a 10b-5 securities class, lacked "typicality" under Rule 23(a)(3), and had a potential conflict of interest with the other members of the class, and (b) common questions did not predominate over individual questions, and the class action was not a superior method of adjudication. With respect to the plaintiffs' ability to provide the type of notice contemplated by Rule 23(*c*)(2), the court indicated that any use of funds from the bankrupt estate for the prosecution of claims of individual shareholders would be improper and with respect to the individual plaintiff (Ms. Silver) stated that ". . . the deposition of Ms. Silver reveals that it is highly questionable whether she can adequately finance the prosecution of a class action as required in *Eisen* v. *Carlisle & Jacquelin*, 479 F. 2d 1005 (2d Cir. 1973) *cert. granted* October 15, 1973, 414 U. S. 908, 94 S. Ct. 235, 38 L. Ed. 2d 146." Under both *Eisen II* and *Eisen III*, the Second Circuit's ruling was clear and specific: ". . . If identification of any number of members of the class can readily be made, individual notice to these members must be given and Eisen must pay the cost. If this cannot be done, the case must be dismissed as a class action." *Eisen III* at 1015; *Eisen II* at 568.

20. In *Buford* v. *American Finance Company*, 333 F. Supp. 1243 (N. D. Ga. 1971), cited at Pet. p. 17, the District Court denied class action status in consolidated cases alleging violations of the Truth In Lending Act on the grounds that common questions did not predominate over individual questions and the class action was not a superior method of adjudication. The court noted *in dicta* that half of the complaints were filed in forma pauperis and that the plaintiffs—who had received legal assistance through the Atlanta Legal Aid Society—could not possibly pay for the required notice, holding that "when parties seek to maintain a class action but cannot assume the cost of providing the notice required by due process, the action cannot be maintained as a class action." (333 F. Supp at 1250)

21. The unpublished opinion in *Givens* (which according to petitioner held that if a class plaintiff cannot assume the cost of providing notice, the action cannot be maintained as a class action) is cited at Pet. p. 17 n. 21.

ruling in *Eisen* that due process requires decent notice" (507 F. 2d at 480), the Tenth Circuit's decision is wholly consistent with these pre-*Eisen* district court decisions.

It is equally clear that the Tenth Circuit's decision is not in conflict with Judge Atkin's holding in *P. D. Q., Inc. of Miami v. Nissan Motor Corporation in U. S. A.*, 61 F. R. D. 372 (S. D. Fla. 1973). (Pet. p. 17)[22]

III.

THE DECISION OF THE TENTH CIRCUIT DOES NOT CREATE A CONFLICT WITHIN THE SAME CASE.

The decision of the Tenth Circuit does not create a conflict between this action and the other antitrust class actions against petitioner in the Nissan Motor Corporation Antitrust Litigation, M. D. L. Docket No. 120, presently pending in the Southern District of Florida.[23]

Petitioner's contention (Pet. p. 19) that the Tenth Circuit's decision is in conflict with Judge Atkins' holding in *P. D. Q.*[24] is clearly without merit.

In *P. D. Q.*, where the District Court refused to certify a nationwide class of approximately 630,000 persons who had purchased Datsun vehicles since July 1, 1968, the plaintiffs had neither the willingness nor the financial ability to bear the estimated cost of the type of notice to the nationwide class contemplated by Rule 23(c)(2).[25] While plaintiff's attorneys,

22. See analysis of *P. D. Q.* decision at pp. 13-14, *infra*.

23. See Statement of the Case at p. 4, *supra*.

24. *P. D. Q., Inc. of Miami v. Nissan Motor Corporation in U. S. A.*, *supra*.

25. In *P. D. Q.*, plaintiff Schaaf testified at his deposition that he had no idea of the cost that might be involved in the bringing of a class action, and, additionally, that he would be willing to invest no more than $1,000 in the prosecution of the suit. Burt Aitkin, the President of P. D. Q., Inc., testified at his deposition that he was

(Footnote continued on next page)

at the hearing on plaintiffs' motion for class determination, voluntarily announced into the record their willingness to advance class notice costs on a "limited basis," counsel indicated their inability to advance postage costs for a nationwide class. (61 F. R. D. at 378 n. 7) In light of the foregoing record, Judge Aitkin held in *P. D. Q.* that:

> "(1) A nationwide class consisting of all purchasers of Datsun automobiles from 1968 to 1972 is not feasible *because of the plaintiffs' inability to perfect the notice required under Rule 23*; and (2) as to those purchasers to whom notice can be given by the plaintiffs, all of the other prerequisites of Rule 23 have been met and a class action should be declared." (emphasis added) (61 F. R. D. at 381)

Thus, Judge Aitkin, pursuant to this Court's decision in *Eisen*, demanded reasonable assurances that the plaintiffs in *P. D. Q.* were willing and able to bear the cost of notice to the nationwide class. Failing to find any such reasonable assurances in plaintiffs' deposition testimony, the district court found it necessary to declare a more limited class to which plaintiffs were willing and able to provide notice of the type contemplated by Rule 23(c)(2). Judge Aitkins' decision in *P. D. Q.* clearly does not authorize antitrust defendants to engage in unlimited, irrelevant and oppressive discovery of the type involved in this action.

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not mean that he was required to bear the cost of class notice. Further questioning revealed that P. D. Q., Inc., would not borrow a large sum of money to pay the costs of class notice. (61 F. R. D. at 377-78)

[2] In *P. D. Q.*, the District Court declared as "class" class consisting of all purchasers of Datsun automobiles from 1968 to 1972, (368 to 1972) (7, 377), who purchased their automobiles in either Nassau County, New York (subsequently modified to Queens County, New York) or Dade County, Florida. (61 F. R. D. at 381.)

IV.

THE DECISION OF THE TENTH CIRCUIT DOES NOT DEPRIVE THE PETITIONER OF DUE PROCESS.

Contrary to petitioner's contention (Pet. pp. 20-22), it clearly has not been deprived of procedural due process by the Tenth Circuit's decision. It has been afforded notice and an opportunity to be heard on the merits of its contentions throughout the pendency of this action. It is equally clear that American jurisprudence recognizes no substantive due process right to engage in unlimited, irrelevant and oppressive discovery of the type involved in this action. Moreover, petitioner's further contention that the Tenth Circuit's decision deprives it of the fundamental right to defend is completely without merit. As the Tenth Circuit recognized, there is no fundamental right to engage in "oppressive discovery as a means of discouraging a private antitrust action which, if meritorious, advances an important interest of the government." (807 F. 2d at 880)

CONCLUSION

The decision of the Court of Appeals for the Tenth Circuit is proper in all respects and manifestly does not involve any question of magnitude or significance justifying review by this Court. There is certainly no special or important reason apparent in this case that should impel this Court in the exercise of its judicial discretion to award the writ. *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U. S. 387 (1923).

The Tenth Circuit's decision is wholly in accord with this Court's holding in *Estes*, is not in conflict with the decision of another Court of Appeals on the same matter, and does not create a conflict within the same case. It is equally clear that the decision of the Tenth Circuit does not deprive petitioner of due process nor of its right to defend.

In light of the foregoing, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

[redacted]

Of Counsel:

[redacted]

APPENDIX A.

AFFIDAVIT OF JAMES W. SANDERSON.

State of Colorado
City and County of Denver } ss.

James W. Sanderson, being duly sworn on oath, deposes and states that:

1. I am one of the plaintiffs in the antitrust class action entitled *Stephen Ruplin, James W. Sanderson and John A. Green v. Minnie Minor Company Ltd., et al*, Civil Action No. 78-W-1004, in the United States District Court for the District of Colorado.

2. I have been advised by my attorney, Mr. Richard M. Kremsdorf, of the law firm of Brennan, Stoll & Baum, Denver, Colorado, that the District Court has granted a motion of plaintiffs' counsel to dismiss as to plaintiff Stphen Ruplin on the ground that Mr. Ruplin was not a member of the proposed class and that plaintiff John A. Green as withdrawn as a plaintiff in Civil Action No. 78-W-1004.

3. Although Messrs. Ruplin and Gren have withdrawn as plaintiffs in Civil Action No. 78-W-1004, I a nevertheless willing to continue, as the sole remaining plaintiff with the prosecution of this antitrust class action, and in that connection I am willing at the present time to bear the cost of mailing to the class, up to, but not exceeding, the total aggregate sum of $4,000.00.

4. This affidavit is submitted in support of affiant's petition to the United States Court of Appeals for the Tenth Circuit

for writs of mandamus and prohibition to the United States District Court for the District of Colorado and for other relief.

/s/ James W. Sanderson
James W. Sanderson

Subscribed and sworn to before me this 13th day of August, 1974.

/s/ Mary Epperson
Notary Public

[Seal]

My commission expires Nov. 28, 1976.

APPENDIX B.

Petitioner's Answer, Served October 1, 1974, to Respondent's Jurisdictional Interrogatory No. 15(c)(i).

"*Interrogatory No. 15:*

State the following:

* * * * *

(c) the total number of new Datsun motor vehicles distributed or sold by Nissan U. S. A. to Nissan dealers located in (i) the State of Colorado, . . . for each of the years 1965, 1966, 1967, 1968, 1969, 1970, 1971, 1972 and 1973;"

"*Answer to Interrogatory No. 15:*

* * * * *

(c) (i) Datsun retail sales are as follows: 1965—340; 1966—[illegible]; 1967—[illegible]; 1968—[illegible]; 1969—[illegible]; 1970—[illegible]; 1971—[illegible]; 1972—[illegible]; 1973—[illegible]; 1974—[illegible]."